Supreme Court, U. S.
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IN THE

Supreme Court of the United States

No. 79-1048

JEFFREY E. CARLSON

Appellant,

vs.

STATE OF MINNESOTA,

Appellee.

MOTION TO AFFIRM JUDGMENT OF THE SUPREME COURT OF MINNESOTA OR, IN THE ALTERNATIVE, TO DISMISS APPEAL

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Appellee, State of Minnesota, in pursuance of Rule 16 of this Court, moves the Court for an Order dismissing the appeal noticed and filed in the above-captioned matter on November 5, and November 8, 1979, on the ground the case does not present a substantial federal question or, in the alternative, affirming the judgment rendered in the Supreme Court of Minnesota by Order of that Court denying appellant's petition for reargument on October 5, 1979, it being manifest that the questions on which decision of the cause depends are so unsubstantial as not to need further argument.

1. Appellant's jurisdictional statement was served on Appellee on January 4, 1980.

2. By this statement, appellant draws into question the decision of the Supreme Court of Minnesota finding valid Minnesota Statutes §§ 152.01 and 152.02 classifying cocaine as a Schedule II narcotic. (Jurisdictional Statement, p. 4.)

3. The questions presented (Jurisdictional Statement, p. 5) are three-fold, the first two of which obviously relate to issues of state law, and do not even purport to raise a question under the United States Constitution; they involve (a) the statutory basis for the classification, and (b) the failure to afford "legislative . . . hearings . . . with respect to the 'harmfulness' of cocaine," no federal right to "legislative hearings" existing.

4. The third issue is defined as:

> "—Whether M.S.A. § 152.02, Subd. 2, by its inclusion of cocaine with opium and amphetamines is so overinclusive, and by its omission of alcohol, caffeine and nicotine is so underinclusive as to constitute an arbitrary and irrational classification for penalty purposes, and is therefore violative of the equal protection and due process clauses of the United States Constitution?"

5. Since appellant raises solely a question of misclassification, and not any question of liberty or privacy in the right to use, possess or distribute cocaine, the rational relationship test of *United States v. Carolene Products Co.*, 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) and no stricter test should be applied.

6. The statutes of the State of Minnesota (§ 152.02, Subdivisions 8-13) provide administrative procedures for change of any claimed misclassification of a controlled substance which should be exhausted, but were not by this appellant.

7. The precise issue here raised, the propriety of classification of cocaine as a Class II narcotic, has been repeatedly litigated in cases arising within the various District Courts and Courts of Appeal of the United States; as to a number of them this court has denied certiorari, and each and every one of them has, so far as appellee is aware, been squarely decided adversely to appellant's position. These cases have been reported at: *United States v. Amidzich*, 396 F.Supp. 1140, 1147 (E.D. Wisc., 1975); *United States v. Brookins*, 383 F. Supp. 1212 (D.N.J., 1974), *summarily aff'd*, 524 F.2d 1404 (3 Cir., 1975); *United States v. Castro*, 401 F.Supp. 120, 126 (N.D. Ill., 1975); *United States v. DiLaura*, 394 F.Supp. 770 (D. Mass., 1974); *United States v. Harper*, 530 F.2d 829 (9 Cir., 1976), *cert. denied*, 425 U.S. 977 (1976); *United States v. Hobbs*, 392 F.Supp. 444 (D. Mass., 1975); *United States v. Kiffer*, 477 F.2d 349, 356 (2 Cir., 1973), *cert. denied*, 414 U.S. 831 (1973); *United States v. Lindelow*, 435 F.Supp. 367 (D. Puerto Rico, 1977); *United States v. Marshall*, 532 F.2d 1279, 1288 (9 Cir., 1976); *United States v. Miller*, 387 F.Supp. 1097 (D. Conn., 1975); *United States v. Smaldone*, 484 F.2d 311 (10 Cir., 1973), *cert. denied*, 415 U.S. 915 (1974); *United*

States v. Umentum, 401 F.Supp. 746 (E.D. Wisc., 1975), *aff'd* (issue not raised) 547 F.2d 987 (7 Cir., 1976), *cert. denied*, 430 U.S. 986 (1977).

8. The Minnesota Statute (§§ 152.01—152.20) is substantially identical to the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 et seq., as amended in 1978, and to the Uniform Controlled Substances Act, which has been enacted in the vast majority of the fifty states and is daily applied to cases involving possession or sale of cocaine as a class II controlled substance.

9. Review of the type of questions of so-called overinclusiveness (classification *with* opium and amphetamines) or underinclusiveness (classification "omitting" alcohol, caffeine and nicotine) involves unwarranted judicial intrusion into the area of legislative decision, it being well settled that a policy need not deal with all evils to deal constitutionally with one admitted evil, and that questions of relative harm from controlled and uncontrolled substances are ones on which reasonable men may, and often do, differ.

WHEREFORE, appellee prays the Court enter an Order dismissing this appeal or, in the alternative, affirming the judgment of the Supreme Court of Minnesota of October 5, 1979, said Order denying reargument of the decision of the unanimous Court of August 3, 1979.

Respectfully submitted,

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